(1)

90-1001

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL T. WESTMORELAND, CORPORAL,
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether a court-martial can sentence a servicemember to confinement for life when, despite the clear language of Rule for Courts-Martial 1006(d)(5), *Manual for Courts-Martial, United States, 1984*, requiring court members to vote on confinement, the military judge, having advised the members that a life sentence is mandatory, fails to specifically instruct the members that three-fourths of them must agree to impose confinement for life?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Michael T. Westmoreland, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 25, 1990.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Westmoreland*, 31 M.J. 160 (C.M.A. 25 September 1990), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, rendered July 31, 1989, is not reported. *United States v. Westmoreland*, No. 87-2598, slip op. (N.M.C.M.R. July 31, 1989). It is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review in this case on March 1, 1990. The

decision of that court was rendered on September 25, 1990, affirming petitioner's conviction of February 5, 1987, as affirmed by the United States Navy-Marine Corps Court of Military Review on July 31, 1989. The jurisdiction of this Court is invoked under 10 U.S.C. § 867 and 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

10 U.S.C. § 852(a)-(b), Article 52(a)-(b), Uniform Code of Military Justice. Number of Votes Required.

* * * * * *

> (a)(2) No person may be convicted of any other offense, except as provided in Section 845(b) of this title (Article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

* * * * * *

> (b)(2) No person may be sentenced to life imprisonment or to confinement for more than ten years

except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

10 U.S.C. § 918, Article 118, Uniform Code of Military Justice.

Murder.

Any person subject to this chapter who, without justification or excuse kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evices a wanton disregard of human life;

(4) is engaged on the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

REGULATIONS INVOLVED

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1006. Deliberations and voting on sentence

(d) Voting

(4) Number of votes required.

* * * * * *

(B) Confinement for life or more than 10 years. A sentence which includes confinement for life or more than 10 years may be adjudged only if at least three-

fourths of the members present vote for that sentence.

* * * * * *

(5) Mandatory sentence. When a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule.

(6) Effect of failure to agree. If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

STATEMENT OF THE CASE

Petitioner was tried by general court-martial (composed of six officer and five enlisted members or jurors) on various dates from October 1986 through February 1987 for violating Articles 81 and 118, Uniform Code of Military Justice (hereinafter, U.C.M.J.).[1] Contrary to his pleas, petitioner was found guilty of one specification of conspiracy to commit murder, in violation of Article 81, U.C.M.J., and one specification of murder, in violation of Article 118, U.C.M.J. Petitioner was sentenced to be confined for life, to be discharged from the Marine Corps with a dishonorable discharge, to forfeit all military pay and allowances, and to be reduced to the lowest enlisted pay grade, E-1. The convening authority (the individual who created the court) approved the findings and sentence as adjudged.

The trial judge instructed the members that at least a two-thirds concurrence (eight of eleven) was required for

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[1] 10 U.S.C. §§ 881 and 918 (1982).

a finding of guilty. Record at 1921 and 1922. He further instructed the members that if a finding of guilty was unanimous, the president should announce that unanimity when announcing the findings. The president of the members did not announce unanimity when announcing the findings of guilty. Record at 2039 and 2040. During the presentencing phase of the trial, the trial judge instructed the members to vote on each proposed sentence in its entirety, until three-fourths of the members concurred on a proposed sentence. Record at 2068. However, the trial judge also advised the members that confinement for life was the mandatory minimum punishment for petitioner's offense and that the members were at liberty to arrive at any lesser punishment except in the area of confinement. Record at 2064 and 2065. Moreover, the sentencing worksheet provided to the members gave no confinement option, other than confinement for life. Appellate Exhibit 115.

Premeditated and felony-murder charges carry a mandatory minimum sentence of life imprisonment. Article 118, U.C.M.J., 10 U.S.C. § 918. By his conviction, and the procedures employed by the trial court below, petitioner was automatically sentenced to confinement for life pursuant to Article 118, U.C.M.J.

Both the Navy-Marine Corps Court of Military Review and the Court of Military Appeals affirmed petitioner's conviction and sentence.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS WRIT TO RESOLVE A CONFLICT BETWEEN THE TENTH CIRCUIT COURT OF APPEALS AND THE COURT OF MILITARY APPEALS REGARDING WHETHER A THREE-FOURTHS VOTE IS REQUIRED ON A MANDATORY SENTENCE.

In his sentencing instructions, the trial judge advised the members that confinement for life was a mandatory

minimum sentence in petitioner's case. The trial judge discussed the range of possible punishments to which the members could sentence petitioner and told them that they must

> Vote on each sentence in its entirety, beginning with the lightest in severity, until you arrive at the required concurrence which is three-fourths—three-fourths—or nine members.

Record at 2068. However, the trial judge *also* specifically told the members that

> I've advised you of the minimum and maximum punishment in this case. The maximum punishment is a ceiling on your discretion, and you are at liberty to arrive at any lesser punishment, *except in the area of confinement*, as I have instructed you.

Record at 2065. Emphasis added.

The trial judge did not at any time specifically instruct the members to vote on appropriate confinement.

The Court of Military Appeals has effectively determined that a military judge need not instruct court members that they must concur by a three-fourths vote in cases where there is a mandatory minimum punishment.

> Likewise, we conclude that the requirement in Article 52(b)(2) that there must be a three-fourths vote of the members in favor of a sentence "to life imprisonment or to confinement for more than ten years" was not intended to negate the mandatory minimum confinement for life prescribed by Article 118 by preventing the judge from instructing the court members that the sentence must include life imprisonment.

United States v. Shroeder, 27 M.J. 87, 89 (C.M.A. 1988), cert. denied ____ U.S. ____, 109 S.Ct. 1121 (1989).[2]

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[2] In *Shroeder*, the trial judge specifically instructed the members that they *must* impose confinement for life upon the accused.

Recently, however, the Tenth Circuit Court of Appeals held that the Uniform Code of Military Justice and the *Manual for Courts-Martial* require a three-fourths vote on mandatory sentences. *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990).

> We must recognize that the *Manual for Courts-Martial* has the force of statutory law . . . The *Manual*—which has the force of law—specifically requires a three-fourths vote for a life sentence, even in cases of mandatory sentences. Thus, we now hold that a military court would be "compelled" by the manual alone to require a three-fourths majority to sentence a defendant to life imprisonment.

Dodson v. Zelez.

The holding in *Dodson v. Zelez* is legally correct. Rule for Courts-Martial 1006(d)(5) specifically provides that when a mandatory minimum sentence is prescribed under Article 118, the members *must still vote to impose the mandatory minimum sentence.* If the required number of members cannot agree on the mandatory minimum sentence, Rule for Courts-Martial 1006(d)(6) provides for declaration of a mistrial and return of the case to the convening authority, who may then either order a rehearing on sentence or order a sentence of no punishment imposed.

This Court has held that sentencing is a "critical stage" in a criminal proceeding which "must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 359 (1977). Due process should, at a minimum, require the government for comply with the procedures prescribed by law. The *Manual for Courts-Martial* sets out very specific procedures which must be followed in order to sentence an individual. Although these rules are absolutely clear, military courts—including

the trial judge in petitioner's trial—have chosen not to comply with them. The instructions given at petitioner's presentencing hearing were inconsistent and misleading. Although the trial judge instructed the members to vote on each proposed sentence, he also told them that confinement for life was mandatory. Moreover, the sentence worksheet did not give the members an option to vote for a lesser period of confinement than confinement for life.

There can be no question but that the military courts' refusal to follow the sentencing procedures so plainly set forth in the *Manual for Courts-Martial* violates both the President's specific mandate in sentencing procedures and military accused's due process rights in sentence hearings. The Tenth Circuit Court of Appeals, in holding that military courts must vote by a three-fourths majority to sentence a person to even a mandatory sentence, properly deferred to both the President's prescribed procedures and the accused's right to due process in sentencing. This decision is correct and should be followed by military courts.

This issue flows from a recurring problem of military construction of three sections of the Uniform Code of Military Justice (U.C.M.J.). Petitioner was convicted of premeditated murder under Article 118 of the U.C.M.J., which mandates life imprisonment for individuals convicted of premeditated murder or felony murder. However, Article 52(b)(2) of the U.C.M.J. provides that:

> No person may be sentenced to life imprisonment or to confinement for more than ten years except by the concurrence of three-fourths of the members present at the time the vote is taken.

These sections are perfectly compatible. Congress has required a three-fourths vote to sentence to life imprisonment and it has set a mandatory life sentence to life imprisonment and it has set a mandatory life sentence for

premeditated and felony murder. Accordingly, Article 52(b)(2) and Article 118, when logically read together, require a three-fourths vote to convict where the mandatory minimum sentence also requires a three-fourths majority.

Congress' concern with the severity of a life sentence is clear. By requiring a three-fourths vote, Congress insured that such a sentence would be imposed only after the most careful deliberation. Congress has not made any express exception to this requirement in cases where a life sentence is mandatory.

The military and courts below, however, have seized upon a third statute, Article 52(a)(2), to circumvent the three-fourths vote mandated by Article 52(b)(2). Article 52(a)(2) states:

> No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

The military courts have thus determined that because Article 52(a)(2) calls for a two-thirds vote to convict, despite the mandatory minimum sentence required, the requirements of Article 52(b)(2) are inapplicable to the question of confinement. Thus, courts-martial manage to both convict an accused and sentence him to life imprisonment based solely upon a two-thirds vote. The military courts have created an artificial conflict among the relevant statutes which they have in turn resolved by providing the least possible protection to the accused.[3]

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[3] At least one federal appellate court has noted the "inconsistency created by a statute that requires a two-thirds vote to convict for a crime carrying a mandatory life sentence and that also requires a three-fourths vote to sentence an individual to life imprisonment. Indeed, we believe that a sensible statutory scheme would require the same percentage vote for conviction and sentence where the sentence is mandatory." *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990).

The military's procedure severely impinges upon the fundamental rights of servicemembers accused of certain crimes. Due process and applicable statutes demand that servicemembers only face life imprisonment upon a three-fourths vote of the sentencing body. The government simply has no legitimate interest in allowing servicemembers to be sentenced to life imprisonment absent the mandatory three-fourths vote for that penalty. Petitioner's interest, on the other hand, in the trial procedures which placed his life and liberty at risk "is almost uniquely compelling." *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985). It is not at all certain that the members on his court-martial would have voted by a three-fourths majority to imprison him for life. In this case, the members required additional instructions before they were able to reach any decision about petitioner's guilt of premeditated murder. Record at 1931-1937 and 2020-2026. Upon receiving the requested additional instruction, the members were *not* unanimous in their findings of guilty. Thus, every vote on this panel was enormously important. It is by no means certain that three-fourths of them agreed to convict petitioner of premeditated murder, and it is equally uncertain that three-fourths of them would have agreed to sentence petitioner to life imprisonment. Petitioner's interest in the full application of the Article 52(b)(2) voting requirement to his case is thus far more compelling than any interest the government might claim in systematically increasing the possibility of life imprisonment in certain types of cases by dispensing with the congressionally-mandated percentage of members needed to impose this sentence.

CONCLUSION

Petitioner respectfully requests that this petition be granted to ensure uniformity among federal courts re-

garding voting requirements for mandatory sentences in courts-martial, and to ensure that imposition of mandatory life imprisonment for premeditated and felony-murder be given only upon a three-fourths vote of guilt by the members in compliance with Article 52(b)(2) U.C.M.J., and due process of law.

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 63,253
NMCM 87-2598

UNITED STATES, APPELLEE

v.

MICHAEL T. WESTMORELAND, CORPORAL,
UNITED STATES MARINE CORPS, APPELLANT

Argued June 12, 1990
Decided Sept. 25, 1990

For Appellant: *Lieutenant Mary Ann Razim,* JAGC, USNR (argued); *Captain A.R. Philpott,* JAGC, USN.

For Appellee; *Lieutenant Rosalyn D. Calbert,* JAGC, USNR (argued); *Commander Thomas W. Osborne,* JAGC, USN (on brief).

OPINION OF THE COURT

EVERETT, Chief Judge:

Contrary to appellant's pleas, a general court-martial composed of officer and enlisted members convicted appellant of conspiracy to commit murder and premeditated murder, in violation of Article 81 and 118, Uniform Code of Military Justice, 10 USC §§ 881 and 918, respectively. The members sentenced Westmoreland to a dishonorable

discharge, confinement for life, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Military Review affirmed in an unpublished opinion.

On appellant's petition, this Court agreed to review whether the military judge erred in instructing the members on a theory of aiding and abetting in connection with the murder specification, and whether the evidence is legally sufficient to sustain appellant's conviction of either offense.[1] Now, after full consideration of these questions, we conclude that appellant's claims are without merit.

I

A

This is a sordid case.[2] For $300.00,[3] apellant agreed to kill the wife of a fellow marine, Darrell Morelock, whom he had met nearly 4 years earlier while serving in the same unit. Morelock and his wife Connie had experienced substantial marital difficulties. Westmoreland suggested that Morelock have Connie killed—and that, if the price was right, he would be willing do the deed. There followed

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[1] Initially, appellant asked our review of the sufficiency of the evidence only as to the murder charge, and we granted review with that limitation. After oral argument, however, we granted appellant's unopposed motion to enlarge the granted issue to include the conspiracy offense, as well.

[2] Our recitation throughout this opinion of the facts underlying the allegations is based on the findings of the Court of Military Review from the evidence of record. We acknowledge that, as will be apparent subsequently in the opinion, appellant disputes many of these facts. However, we must accept that court's resolution of factual disputes. Art. 67(d), Uniform Code of Military Justice, 10 USC § 867(d).

[3] There was some evidence of "a misunderstanding" as to this price "and that appellant had really wanted $3,000.00." Unpub. op. at 2.

3 months of cold-blooded planning of Connie's murder among appellant, Morelock, and Morelock's girlfriend, Melissa Bates. The plot culminated in Connie's death after receiving over 30 stab wounds to her hands, arms, legs, back, chest, and neck.

The two specifications on which appellant was arraigned and tried were:

Charge I

> In that Corporal Michael T. WESTMORELAND . . . did . . . conspire with Corporal Darryl F. MORELOCK . . . and Air Controlman Airman Recruit Melissa Orme BATES . . . to commit an offense under the Uniform Code of Military Justice, to wit: the premeditated murder of Connie Harryman MORELOCK, and in order to effect the object of the conspiracy, Corporal WESTMORELAND and Corporal MORELOCK discussed various ways to kill the intended victim and negotiated price and location for the killing . . . and then murdered Connie Harryman MORELOCK after Corporals WESTMORELAND and MORELOCK lured [her] to a secluded area . . . where Corporal WESTMORELAND did fatally wound [her] by repeatedly stabbing her with a knife.

Charge II

> In that Corporal Michael T. WESTMORELAND . . did . . . with premeditation and for monetary gain, murder Connie Harryman MORELOCK by means of mortal wounds inflicted by a knife.

As the last clause of the conspiracy specification suggests, it was the Government's theory that Morelock had hired Westmoreland to kill Morelock's wife and that, after the two of them had lured her to a remote, wooded area late one night, appellant had, indeed, done just that while Morelock waited nearby.

Overwhelmingly, the prosecution's evidence came from the mouth of Morelock himself. This witness had already been convicted of his wife's murder in a North Carolina State Court and was awaiting sentencing at the time of appellant's trial. He had received some assurances that, if he cooperated in appellant's prosecution, he would not receive a death sentence in his own case. Therefore, chiefly by cross-examination, the defense sought to establish that Morelock was simply trying to find a scapegoat to whom he could transfer the blame for his own crime. Although Westmoreland did not testify himself, the defense claimed that he had not even been at the scene of the fatal stabbing.

As the record of trial makes clear, the case was tried by both the Government and the defense on the theory that either Westmoreland had wielded the knife which killed Connie Morelock or he had done nothing at all. When it came time for the military judge to consider his instructions to the members for their deliberations on findings, he asked the prosecutor several times whether the Government wanted an aider-and-abettor[4] instruction. Each time, trial counsel declined and, in agreement with defense counsel, suggested that it was an all-or-nothing case. The military judge acquiesced.

During the deliberations, the members returned with a request for reinstruction on the elements of the offenses. At the conclusion of these instructions, the president of the court wrote out two questions for the military judge,

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[4] As has been made clear, "Article 77, [UCMJ], 10 USC § 877, abolishes the distinction between principals and aiders-and-abettors." *United States v. Vidal*, 23 MJ 319, 325 (CMA), *cert. denied*, 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987).

the relevant one for our purposes being as follows (app. ex. 112):

> In the murder charge, 118 is it necessary for the accused to be proven the actual murderer or is it sufficient that if he/she were proven part of the conspiracy that he/she could be found guilty of the charge also?

This question precipitated several hours of legal research by and discussion among counsel and the military judge. During the discussion, the judge indicated that he interpreted the question primarily to address the area of vicarious liability of coconspirators.[5] However, he expressed the view that, for this theory of guilt to be available, the prosecution must give clear and early notice of it to an accused, so that he might defend himself effectively. Since trial counsel had not done this, the military judge concluded that during the court members' deliberations was too late in the trial to introduce this theory for the first time.

The judge was more sympathetic to a belated introduction of an aider-and-abettor (principal) theory—which he believed was also encompassed by the court members' in-

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[5] Paragraph 7-1*b*, Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* at 7-4 (Change 1, 1985), advises: "Co-conspirators are criminally liable for any substantive offense committed by any member of the conspiracy in furtherance of the conspiracy or as an object of the conspiracy while the accused remained a member of the conspiracy." This is consistent with "the prevailing rule" that, "[i]f the conspiracy is successful, . . . a conspiracy may be subject to conviction for both the conspiracy and the completed crime." W. LaFave and A. Scott, *Substantive Criminal Law* § 6.5 at 86 (1986). *See* para. 5c(5), Part IV, Manual for Courts-Martial, United States, 1984. Moreover, "[c]umulative sentences are permissible in most jurisdictions, though this has been criticized when the conspiracy is to do no more than that crime." LaFave, *supra* at 86. *See* para. 5c(8), Manual,*supra*.

quiry. *See* Art. 77, UCMJ, 10 USC § 877. Indeed, the judge even indicated that he had wondered himself whether an instruction on their theory of guilt was warranted but that he had been dissuaded from giving one by trial counsel's repeated disavowal of the theory.

Defense counsel strenuously resisted the last-minute resort to this new theory of guilt. Initially, he challenged the evidentiary basis for an aider-and-abettor instruction, since the prosecution had contended throughout the trial that Westmoreland himself had perpetrated the killing. Indeed, defense counsel pointed out that Morelock, the pivotal witness for the prosecution, had unequivocally testified that appellant had killed Connie while Morelock himself had waited nearby.

Trial counsel responded that the members were not bound to either believe or disbelieve Morelock's testimony in its entirety. Instead, they were free, if they so chose, to believe it only up to the point where the witness had described the stabbing and to reject his account from that point on. Trial counsel urged that, if the court members believed Morelock himself had killed his wife—as the question by the court members might imply—then an aider-and-abettor instruction would be based on the evidence and, therefore, was appropriate.

Next, defense counsel argued that the prosecution was bound at that late stage of the trial by its chosen theory that Westmoreland had wielded the knife; and he claimed that, had the defense been apprised of possible alternative approaches to liability, it would have directed its trial efforts quite differently.

In response, the military judge reflected some sympathy for the defense position. At the same time, he pointed out that it ultimately was his responsibility to ensure that the members were fully and correctly instructed on any matter

reasonably raised by the evidence, regardless of the parties' wishes. He asserted that initially he had been guided by the prosecutor's preferences—although admittedly he had been perplexed by them, since he had considered that an aider-and-abettor instruction would benefit the Government. Because the court members' question implied that they were probing this area, the instruction now seemed necessary.

Even so, the military judge acknowledged the special problems that defense counsel had raised. He offered to permit the defense to reopen its case, present new argument to the members, or both. After a continuance of several days, defense counsel declined these opportunities—expressing the belief that such remedies would be ineffective so late in the trial.

At last, after much discussion and some vacillating on whether to give the instruction at all and, if so, whether it applied to both charges or only to the murder specification, the military judge finally decided to give an aider-and-abettor instruction but to do so only as to the murder charge and not the conspiracy. Thereafter, the military judge gave a lengthy instruction to the members that explained aiding and abetting in some detail and advised how it might fit this case.

Subsequently, the members renewed their deliberations and returned 2 and a half hours later with findings. On the conspiracy specification, Westmoreland was found guilty as charged. As to the murder specification, the finding was in this language:

> Of the specification of the Charge Number II: Guilty, except of the words, "murder Connie MARRYMAN [sic] MORELOCK by means of mortal wounds inflicted by a knife," substituting therefor respectively the words, "aid and abet Corporal Darrell F. MORE-

> LOCK in the murder of Connie HARRYMAN MORELOCK whose death resulted from mortal wounds inflicted by a knife"; of the excepted words, not guilty; of the substituted words, guilty; of the specification to the Charge Number II as excepted and substituted, guilty, of the Charge II: Guilty.

B

The military judge's independent duty to determine and deliver appropriate instructions cannot seriously be challenged. In language that is forecful in its clarity in this regard, this Court stated in *United States v. Graves,* 1 MJ 50, 53 (CMA 1975):

> Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. Simply stated, counsel do not frame issues for the jury; that is the duty of the military judge based upon his evaluation of the testimony related by the witnesses during the trial.

Most often, it is clear whether a lesser-included offense or an affirmative defense or some theory or question of law has been rasied by the evidence. Occasionally, though, it may not be at all clear; occasionally, the members may taken an unanticipated view of or approach to the evidence that may raise issues that the military judge cannot reasonably be charged with foreseeing. This is such a case.

A fair reading of the evidence makes clear that, from the viewpoint of both the Government and the defense, the issues to be tried were whether Westmoreland conspired with Morelock and Bates to kill Morelock's wife and whether he carried out the plot by committing the ulti-

mate deed. Morelock's testimony and other supporting evidence indicated affirmative answers to these issues. Contrariwise, appellant claimed that he had nothing whatsoever to do with the homicide. At no time did either side suggest the possibility that the conspiracy had existed but that—whether pursuant to this conspiracy or otherwise—Morelock himself had killed Connie.

Given this state of the evidence, the military judge properly omitted to give an aider-and-abettor instruction prior to the deliberations. Indeed, such an instruction at that point might well have served only to have confused the members.

The question raised by the members during their deliberations, however, cast a new light on that evidence. The military judge inferred from the question that the members might have some doubt whether Westmoreland himself had done the killing, as Morelock had testified, and that they were seeking guidance on whether appellant, nonetheless, would be guilty of murder. In other words, as trial counsel argued, the members' question could be read to imply that they believed Morelock's version up to the point of the ultimate act but had some doubt about his testimony that appellant, and not he, had stabbed the victim.

Of course, the members were entirely free to view the evidence in this way. Even in the absence of any direct evidence to this effect, the members in their deliberations could properly have concluded that Morelock had unduly minimized his own part in the final act of the conspiracy and that he—rather than appellant—had inflicted the stab wounds on his wife.

Although the question by the court members seemed to address appellant's vicarious liability for participating in a conspiracy, rather than aiding and abetting a crime, the

two concepts are closely related.[6] Thus, the military judge was confronted with a situation in which the court members had indicated that they might be viewing the evidence in a manner that was unexpected but that was rational and within their province. With this rather unusual development, it not only was within the judge's proper discretion, but also was his *sua sponte* responsibility, to provide the members with appropriate guidance. *See United States v. Graves, supra.* We repeat what was said in *United States v. Jackson,* 6 MJ 261, 263 n. 5 (CMA 1979):

> The Court again emphasizes to all participants in the trial that it is absolutely essential that *all* factual issues and offenses raised at all in the evidence be the subject of instructions—requested or not—by the trial judge. This is demanded not out of an abundance of caution, but from the desire that the fact-finding function be exercised to the fullest by the jury—the essence of a fair trial.

(Emphasis added.)

The judge chose not to allow the court members to convict appellant of Connie's murder if they found that he had entered a conspiracy to that end and someone else had killed her pursuant to the conspiracy. To that extent, he protected appellant—perhaps more than was required. However, the military judge's instructions did properly permit the members to convict Westmoreland of premeditated murder if they found that he had aided and abetted Morelock in the homicide.

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[6] For a comparison between complicity (as a principal) and conspiracy, as well as an excellent analysis of the legal questions and potential problems lurking in both theories, *see* LaFave, *supra* at § 6.8 at 153-66. Practitioners should carefully consider this sensitive treatment of accomplice and co-conspirator liability before drafting charges or formulating instructions under paragraph 7-1 of DA Pam. 27-9, *supra.*

C

The language of the murder specification on which appellant was tried was sufficient to encompass a killing performed solely by Westmoreland; a killing which he had aided and abetted; or a killing pursuant to a conspiracy of which he had been a member. Moreover, a finding of guilty could have been rendered in the words of this specification and without exceptions and substitutions—whether the factfinder determined that Westmoreland perpetrated the murder; aided and abetted it; or conspired to accomplish it.

The defense, however, contends that at some point before findings the prosecution must elect among the theories of criminal liability; that, thereafter, the military judge may only instruct the court members as to the theory that the Government has elected; and that the accused may not be found guilty unless two-thirds of the court members agree on this theory of guilt.

Rejecting a similar contention in *United States v. Vidal,* 23 MJ 319 (CMA), *cert. denied,* 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987), we stated:

> Appellant was charged with raping Andrea Blum; but the allegations do not indicate whether he was the perpetrator or only an aider and abettor to Hunt's actions. However, the standard-form specification of rape was sufficient to charge either theory; and even though the Government may initially proceed on one theory, it is entitled to utilize the alternative theory of guilt before the members. *See, e.g., United States v. Brooks,* 22 MJ 441, 444 (CMA 1986). . . .
>
> Under such circumstances, it has not heretofore been required that two-thirds of the members agree as to the particular theory of liability. *Cf. United States v. Lomax,* 12 MJ 1001, 1004-05 (ACMR), *pet.*

denied, 13 MJ 467 (1982); *United States v. Clements,* 12 MJ 842, 845 (ACMR), *pet. denied,* 13 MJ 232 (1982). And we do not believe now that such a requirement need be imposed in order to fulfill the statutory mandate that two-thirds of the court-martial members must concur in a finding of guilty. Art. 52(a)(2), UCMJ, 10 USC § 852(a)(2). *Cf. United States v. Barton,* 731 F.2d 669 (10th Cir. 1984). If one-third of the members are satisfied that the accused personally fired the shot and another third find that he aided someone else in doing so, he can properly be convicted of murder, because two-thirds of the court members are convinced beyond a reasonable doubt that the accused, on one theory or another, committed murder at the particular time and place. . . .

23 MJ at 324.

In light of *Vidal,* we conclude that, here, the military judge could properly instruct the members that Westmoreland was guilty of the murder of Connie Morelock whether he stabbed her or aided and abetted her husband when he stabbed her. Moreover, a court member could properly vote to convict on either theory—or even if he was unsure which of the two men wielded the knife but was convicted beyond a reasonable doubt that Westmoreland did so himself or else aided Morelock to do so.

From the outset, the language of the murder specification placed the defense on notice of the alternative theories of guilt available to the Government in its prosecution. When the military judge decided to instruct only on the theory that appellant had killed the victim—as the testimony seemed to indicate—appellant did not acquire a vested right to have his guilt determined only on this basis.

In view of the theory on which the case had been tried up to that point and the evidence and arguments that had

been presented, the military judge, after deciding to give an aiding-and-abetting instruction, quite appropriately offered defense counsel the opportunity to reopen his case, present additional argument, or both. Had this offer not been made, the defense would have had a more plausible argument that it was prejudiced. However, having given the defense this opportunity, the military judge was free to instruct on aiding and abetting when the defense declined his offer.

II

A

Appellant claims that the evidence against him was insufficient to support the findings. To some extent, his argument on this issue parallels his attack on the instruction on aiding and abetting. In this connection, the defense points out that, in its findings on the murder specification, the court members made exceptions and substitutions whereunder appellant's guilt was predicated on aiding and abetting. However, it further notes that the record contains no evidence of aiding and abetting; and on the conspiracy specification the court members found that Westmoreland had stabbed Connie Morelock with a knife.

The specific finding by the court members that appellant had aided and abetted Morelock in the murder was gratuitous. The members could properly have returned a finding of guilty without exceptions and substitutions, even if they were convinced that appellant had only been an aider and abettor, and had not done the stabbing himself. In our view, the insertion of the aiding-and-abetting language does not affect the sufficiency of the evidence or of the finding of guilty. If the evidence was adequate to establish beyond a reasonable doubt that Westmoreland and Morelock had driven Connie to a deserted place where

one or the other of them – or perhaps both – stabbed her to death, then it was legally sufficient. *See United States v. Harper,* 22 MJ 157, 161 (CMA 1986).

Viewing the events in context, we are not disturbed by the finding on the conspiracy specification that "Westmoreland . . . fatally wound[ed] Connie . . . by repeatedly stabbing her iwth a knife." In the first place, this is merely one of several overt acts alleged in connection with the conspiracy; and if it were stricken, the legal effect of a conviction on the remaining allegations in the conspiracy specification would be the same. Secondly, the military judge did not instruct the court members that they could use an aiding-and-abetting theory in connection with their findings on the conspiracy specification. Finally, we conclude in any event that any inconsistency between the conspiracy findings and the findings on the murder specification was not prejudicial.

B

Appellant also complains that he was linked to these crimes by the testimony of Morelock alone; that the testimony of Morelock was "self-contradictory, uncertain, or improbable"; and that the uncorroborated testimony of his alleged accomplice is legally insufficient to sustain the findings.

Judge Albertson, writing for the court below, noted that the prohibition against a conviction that is based on "uncorroborated" accomplice testimony which is "self-contradictory, uncertain, or improbable," contained in paragraph 74*a* (2), Manual for Courts-Martial, United States, 1969 (Revised edition), which governs this case, has not been expressly adopted in Manual for Courts-Martial, United States, 1984. *See* Discussion, RCM 918(c), 1984 Manual, *supra.*[7]

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[7] Judge Albertson also noted that a division has existed among the Courts of Military Review as to whether an accomplice's testimony at

However, we need not discuss the effects of this omission. Assuming that Morelock's testimony was "self-contradictory, uncertain, or improbable" and, thus, needed corroboration in order to sustain appellant's conviction, *see* para. 7-10, Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* at 7-15 (May 1982), his trial testimony as to appellant's involvement in the conspiracy and in the murder itself was adequately corroborated by testimony of other witnesses and by documentary evidence. Accordingly, the evidence is legally sufficient to sustain both findings of guilty.

III

The decision of the United States Navy–Marine Corps Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

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trial – which otherwise would not be "self-contradictory, uncertain, or improbable" – is rendered so because the witness admits that he has made prior inconsistent statements. Unpub. op. at 10.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS COURT
OF MILITARY REVIEW BEFORE

EDWARD M. BYRNE E. M. ALBERTSON R. A. JONES

UNITED STATES

v.

MICHAEL T. WESTMORELAND, 506 94 3974
CORPORAL (E-4), U.S. MARINE CORPS

NMCM 87-2598 Decided 31 July 1989

Sentence adjudged 5 February 1987. Military Judge: R. J. Dove. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Base Commander, Marine Corps Base, Camp Lejeune, NC 28542-5001.

LCDR ROBERT J. SMITH, JACG, USN, Appellate Defense Counsel.
LT B. E. SMIRCINA, JAGC, USNR, Appellate Government Counsel

ALBERTSON, Judge:

Appellant was tried by a general court-martial composed of officer and enlisted members on various dates in October 1986 through February 1987 for alleged violation of Articleds 81 and 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 918, respectively. Contrary to his pleas, he was found guilty of conspiracy to commit the murder of Connie Morelock and, by exceptions and substitutions, of the murder of Connie Morelock. He was sentenced to confinement for life, forfeitures of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge from the Naval Service. The convening authority approved the findings and sentence.

Appellant assigns as the only error the following issue:

> THE GOVERNMENT FAILED TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

The premise upon which appellant relies in his brief in addressing the assigned error is that the Government's case rested almost entirely on the uncorroborated testimony of appellant's alleged accomplice, Darrell Morelock, who, between the time of the murder and the time of appellant's trial, had himself been convicted of premeditated murder and conspiracy to murder his wife, Connie Morelock, and was awaiting sentencing in North Carolina State Court. As a result of this conviction, Morelock had received an Other Than Honorable administrative discharge from the U.S. Marine Corps. Morelock testified at appellant's trial under a grant of federal immunity, with an agreement from North Carolina authorities that, were he to testify, they would not seek to impose the death penalty against him.

The Government's theory of the case was that appellant conspired with then-Corporal Darrell Morelock, USMC, and ACAN Melissa Bates, USN, Morelock's lover, to murder Connie Morelock. To that end, Darrell Morelock allegedly paid appellant $300.00 to commit the murder. Morelock testified that there was a misunderstanding about the price, and that appellant had really wanted $3,000.00.

THE FACTS

Connie Morelock was murdered on 28 July 1984. Stabbed in the hands, arms, legs, back, chest, and neck, nearly thirty times in all, she was left to die at Murdock's Pond, six miles outside Atkinson, North Carolina.

We have gleaned the following facts from the testimony of Darrell Morelock.

Appellant and Darrell Morelock first became friends in late 1981 when they served together in Weapons Company, 2/8 at Camp Geiger, North Carolina. Morelock testified that his marriage to Connie, even then, was troubled because of her inability to cope with the Marine Corps and his frequent deployments and field maneuvers. Morelock's public dissatisfaction with his marriage started in 1982, when he was heard complaining of his wife's overspending and stating that he should kill her. A statement, to which appellant, nicknamed "Mike the Knife" for his collection of knives, replied, though not yet in a serious manner, "I'll kill her if the price is right."

In December 1983, Morelock was transferred out of 2/8, and sent to Air Traffic Controller's School at NAS, Millington, Tennessee. There, Morelock met and moved in with ACAN Melissa Orme (now Bates), a fellow stu-

dent. While Morelock was attending this school, Connie Morelock and their daughter, Stacey, had moved back to stay with Connie's mother in Laurel, Maryland.

After finishing school, Darrell Morelock was transferred to MCAS, Beaufort, South Carolina. Melissa Bates stayed with him for a few weeks before reporting to her duty station in Puerto Rico. Shortly thereafter, Connie Morelock came down with their daughter Stacey to help her husband move their belongings from his previous permanent duty station at Camp Lejeune to Beaufort. Darrell Morelock testified that he quickly realized their marriage would not work out and he told Connie he wanted a divorce. After they arrived in Beaufort, Connie left him while he and Stacey were out for a walk.

A few days later she called and wanted to reconcile their relationship but Darrell Morelock refused. Connie then went to stay with Pat Cox, one of her friends at Camp Lejeune.

Being a single parent with a new occupational specialty and a new duty station was unmanageable for Darrell Morelock, so, at his request, Bates became an unauthorized absentee and moved to Beaufort to help Morelock care for Stacey. On the same date, 1 May 1984, appellant returned to Camp Geiger from a deployment. Three days later, Morelock and Stacey went to Jacksonville, North Carolina, to see appellant, who owed Morelock $150.00. Morelock mentioned his difficulties with Connie, and appellant stated that Morelock should have Connie killed, and that appellant would do it if the price was right.[1]

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[1] Corporal John Manley, USMC, testified he heard similar comments but did not take them seriously.

Marital difficulties between the Morelocks intensified. Morelock sought to contact his wife, who still was staying at her friend's house in Jacksonville, North Carolina. Morelock made arrangements to have Connie return by bus to Maryland to stay with her mother. Morelock drove to Jacksonville with Bates to see if Connie would depart on the bus. Angered when Connie did not leave as planned, Morelock dropped Bates off at a shapping mall to watch a movie and went to see appellant. Morelock and appellant drove to Onslow Pines Park, where they discussed in detail the means and methods to be used in murdering Connie. No one else was present for this meeting. Appellant agreed to murder Connie on the condition that Morelock not be present for the actual murder.

The next day, 17 May, Connie came to Beaufort to take Stacey away from Morelock. Infuriated, he refused, and put Connie on the bus to Maryland. On 23 May, Connie, her mother, and her brother showed up at Morelock's house in Beaufort with the police, attempting to get him to give Stacey to Connie. He refused. Prior to leaving Beaufort, Connie and her relatives went to see Morelock's section officer-in-charge Captain Zarner, and told him that Darrell Morelock was living with Bates. Captain Zarner counselled Morelock, and this further enraged him.

Morelock consulted a divorce lawyer, paid him a retainer with money borrowed from his mother, and was told that he probably would not be awarded custody of Stacey should a custody dispute arise. This helped to confirm his decision that Connie should be murdered. In mid-June 1984, Morelock's aunt, who had been staying with him and Bates, returned to Maryland with Stacey and gave her to Morelock's mother. A few days later Connie arrived

in Maryland and took Stacey pursuant to a court order. Morelock was served with divorce papers on 19 June.

A series of phone calls and meetings between appellant and Morelock began on 13 July. On 13 July Morelock called appellant at the barracks to arrange a meeting in Jacksonville to search for a spot to murder Connie. On 14 July, Morelock rented a car and drove to Jacksonville with Bates. After dropping Bates off at the New River Shopping Mall, Morelock picked up the appellant, and they drove together to the Croatan National Forest and down Highway 53, looking for a murder location. Morelock and appellant then agreed that Connie would be murdered on the 21st of July by drugging her and then throwing her off a bridge. Morelock agreed to supply the drugs. On 16 July, Morelock told his lawyer that he no longer needed a divorce from Connie. On 17 July, Morelock called Connie in Maryland to arrange to pick her and Stacey up to return to Beaufort under the pretense of an attempted reconciliation. He used this pretense to get her to North Carolina to murder her. The next day, Morelock called Connie in Maryland to change the date of their reconciliation until the weekend of 28 July. Morelock stated that he had "cold feet" about the situation. Later on the evening of 18 July, appellant called Morelock collect from the barracks at Camp Geiger, asking about payment. They agreed to postpone the murder until 28 July, with Morelock to drive to Jacksonville on 21 July and pay appellant the agreed upon price of "three" for the murder.

Morelock and Bates rented a car and drove to Jacksonville on 21 July to meet with appellant. Morelock met appellant at a Hardee's on Highway 17, and, while Bates remained in the car, paid appellant $300.00 to murder Connie. On 23 July, Morelock phoned his sister to arrange the

purchase of drugs to be used on Connie. On that same date, appellant called Morelock collect to discuss which hotel to use in the Jacksonville area to set up the murder. Several more phone calls between appellant and Morelock to confirm plans were made prior to 28 July.

At 0200 on 28 July, Morelock left the Kinstonian Motor Inn in Kinston, North Carolina, where he and Melissa Bates had booked a room. Morelock went first to his sister's house in Maryland, seeking the drugs mentioned above, but she could not procure them from her pharmacist husband. Picking up Connie at 1200 at her parent's house, they returned to the Kinstonian Motor Inn in the early evening of the same day. Morelock had told Connie that they were going to see appellant in Jacksonville because appellant owed him money and because Morelock wanted Connie to have sex with appellant as retaliation for the affairs Morelock had had with other women while married to her. The Morelocks booked a room and, telling Connie he was taking Stacey to an overnight baby-sitting service, Morelock took Stacey instead to Melissa Bates' room to drop her off.

The Morelocks then drove down to Jacksonville and picked up appellant at the Triangle Motel. The three of them drove out of Jacksonville to Murdock Pond. Darrell Morelock then claimed that they stopped the car, got out and walked down to the pond. Shortly thereafter, appellant suggested that Morelock get a blanket out of the car so they could sit down. As Morelock was leaving, Connie Morelock asked him not to leave her alone, at which point he kissed her, ran back to the car with his hands over his ears, and waited with his eyes closed. Shortly thereafter appellant allegedly returned to the car, said "it's done" and they left. On 30 July 1984, her body was found by a local

resident near Murdock Pond, outside Atkinson, North Carolina. She had been stabbed to death. There is no question that Connie Morelock was murdered. The court members found appellant guilty of the murder of Connie Morelock as an aider and abettor rather than as the perpetrator.

Appellant argues that because of the inconsistencies between Darrell Morelock's trial testimony and his various pretrial statements, his trial testimony ought not be believed; and that, without that testimony, appellant's guilt is not established beyond a reasonable doubt.

APPELLANT'S ASSERTIONS

Appellant asserts that the only direct evidence of appellant's involvement in the murder was the testimony of Darrell Morelock. Further, Morelock had the strongest possible motivation to testify against and "pin" the crime on appellant; it was literally a matter of life and death for him. In return for his testimony against appellant, North Carolina authorities had promised not to seek the death penalty against him.

Even were the stakes not so great, Darrell Morelock's testimony is claimed to be inherently suspect because he was an alleged accomplice, and such testimony precludes a conviction if "the testimony is self-contradictory, uncertain, or improbable." Para. 153a, Manual for Courts-Martial, United States, 1969 (Rev.) (MCM, 1969).

Particularly significant, says appellant, is the fact that Morelock kept changing his version of the alleged events. Appellant claims four distinct versions: (1) his sworn statement to the Naval Investigative Service on 18 November 1985; (2) his testimony during pretrial motions; (3) his

testimony on the merits; and (4) certain other statements he made to Melissa Bates.

The appellant asserts that the inconsistencies in these stories relate to crucial aspects of the case, including Darrell Morelock's claim that he was too peaceable to kill Connie Morelock himself; the source of the money he allegedly paid appellant; whether he saw appellant with a knife the night of the murder; whether appellant was going to have sex with Connie Morelock prior to killing her, and where the evidence was disposed of. The military judge, during instructions to the members on findings summed up some of the inconsistencies as follows:

> Darrell MORELOCK testified that if the body of Connie were found he would collect insurance proceeds to pay Corporal WESTMORELAND; and that was testified to at trial. In his sworn statement given to the Naval Investigative Service Darrell MORELOCK stated that Corporal WESTMORELAND had told him that he would not commit the murder for insurance proceeds. At trial Darrell MORELOCK testified that on 28 July 1984—excuse me, let me come back to that in a minute. At trial Darrell MORELOCK testified that he paid Corporal WESTMORELAND $300.00 to commit the murder and that the money came from his income tax refund. In his sworn statement given to NIS, Darrell MORELOCK stated that he borrowed money from his mother which she sent to him by Western Union or by check and he paid Corporal WESTMORELAND $300.00 from that money. At trial Darrell MORELOCK testified that he did not buy any liquor in Jacksonville on the night of 28 July 1984. He said he purchased sodas. Darrell MORELOCK testified that he left Connie at the Tri-

angle when he went to buy the sodas; and in his sworn statement given to NIS Darrell MORELOCK stated that Connie and he drove to a liquor store on Highway 17 where Darrell MORELOCK bought a bottle of Southern Comfort and Bicardi. [sic] Darrell MORELOCK testified under oath at the motion stage of this trial that Corporal WESTMORELAND already had some liquor but Connie didn't like the kind he had. Darrell MORELOCK testified that WESTMORELAND had Bicardi [sic] or rum or something and that he walked by himself to the Triangle liquor store and purchased several more bottles of liquor, Southern Comfort, something sweet that Connie would drink. Darrell MORELOCK testified that Corporal WESTMORELAND handed him a rolled up pair of blue jeans in a bundle at Murdock Pond. Darrell MORELOCK testified under oath at the motion stage of this trial that Corporal WESTMORELAND handed him a bundel of clothes and the blue jeans were all he could see of the clothes; testified that he assumed a shirt was inside the bundle because Corporal WESTMORELAND was no longer wearing his shirt. In his sworn statement given to NIS Darrell MORELOCK states as WESTMORELAND got into the car he said, "it's done and handed me the checkered shirt he was wearing. I didn't look inside the checkered shirt." Darrell MORELOCK testified that he did not tell Melissa BATES that he had brought condoms with him on 28 July 1984 for Corporal WESTMORELAND to use when Corporal WESTMORELAND had sex with Connie. Melissa BATES testified that Darrell MORELOCK brought condoms with him on 28 July 1984, and that Darrell MORELOCK told her that Corporal WESTMORELAND had sex with Connie. Melissa BATES testified that

Darrell MORELOCK brought condoms with him 28 July 1984 and that Darrell MORELOCK told her that Corporal WESTMORELAND might want to use them. Darrell MORELOCK testified that he did not tell Melissa BATES and Corporal WESTMORELAND—excuse me, Darrell MORELOCK testified that he did not tell Melissa BATES that Corporal WESTMORELAND was going to pay $500.00 to have sex with Connie and was—and that was how Darrell MORELOCK was to get Connie into the woods. Melissa BATES testified that Darrell MORELOCK told her before leaving the Kinstonian MOtel that Corporal WESTMORELAND had offered to pay $500.00 to have sex with Connie and that was how he was going to convince Connie to go out in the woods with Corporal WESTMORELAND. Darrell MORELOCK testified that he was exiting the back door of the Triangle Motor Inn—excuse me, Darrell MORELOCK testified that as he was exiting the back exit of the Triangle Motor Inn he placed Corporal WESTMORELAND's bundle of clothing in a little white plastic car trash bag. In his sworn statement given to NIS, Darrell MORELOCK stated that when Corporal WESTMORELAND got into the car at MURDOCK's Pond and handed him the rolled up checkered shirt, placed the shirt in a white colored plastic trash bag, and placed the bag on the rear floorboard (sic). Darrell MORELOCK testified that he did not tell his attorney, Mr. Gary TRAYWICK that the last time he saw Connie she was performing fellatio on Corporal WESTMORELAND. Mr. Gary TRAYWICK testified that Darrell MORELOCK told him that he would have never told Melissa BATES that Connie would be taken to the woods and her throat would be cut before he left the Kinstonian Motel be-

cause he assumed Corporal WESTMORELAND would have drugs. Melissa BATES testified that Darrell MORELOCK told her before leaving the Kinstonian that if they didn't have the drugs WEST (sic) was going to have sex with Connie and Corporal WESTMORELAND was going to slit Connie's throat. Melissa BATES testified that Darrell MORELOCK told her that he had to go out and work over a nurse for the nurse's husband while they were in school in Tennessee. Upon seeing Darrell MORELOCK later with bloody brass knuckles, Darrell MORELOCK explained that things had gone too far. Darrell MORELOCK testified that he did not recall telling Melissa BATES about having to work over a nurse or telling her that things had gone too far. Darrell MORELOCK testified that on 2 September 1984 he and Corporal WESTMORELAND went to Murdock Pond to see if the body of Connie had been found. After discovering that the body had been discovered, he and Corporal WESTMORELAND decided to go to Beaufort, South Carolina. In his sworn statement given to NIS, Darrell MORELOCK stated he picked up Corporal WESTMORELAND in mid-August. They drove out to Murdock Pond to see if the body had been found, and after seeing that the body had been found, Darrell MORELOCK drove Corporal WESTMORELAND back to Camp Geiger barracks. Melissa BATES testified that Darrell MORELOCK told her that his daughter, Stacey, was a child born of his aunt whom he impregnated. Darrell MORELOCK testified that he told Staff Sergeant METROWKE, now Mr. METROWKE, that he was going fishing on the night of 2 September 1984 and that he asked the METROWKES if he could leave Stacey with them.

> Mr. METROWKE testified that Darrell MORELOCK asked him and his wife to babysit Stacey because he had a date with a Navy E-6. Now, you have heard evidence that Mr. MORELOCK made a statement prior to trial that may be inconsistent with his testimony at this trial. Specifically, Darrell MORELOCK testified that on 28 July 1984 he left the Kinstonian Motel for Jacksonville and that he arrived around 10:00 p.m. In his sworn statement given to NIS, Darrell MORELAND stated that he arrived at the Triangle Motor Inn at approximately 9:00 p.m. on 28 July 1984. Darrell MORELAND testified that he noticed a black sheathed knife on the night stand in Corporal WESTMORELAND's room at the Triangle Motor Inn which was about eight inches long. The knife had a dull black handle with ridges and a case that was darker than the handle. The knife had a clip or coins beneath it. In his sworn statement given to NIS, Darrell MORELOCK stated that Corporal WESTMORELAND almost always has a knife in his pocket, "Although I didn't see him with a knife on the night of 28 July 1984."

Record 1915-1917.

Appellant, anticipating that the Government would argue that Darrell Morelock's testimony was corroborated by the immunized testimony of Melissa Bates, asserts such argument is unpersuasive because Melissa Bates is hardly a credible witness herself. Irrespective of whether she still cared for Darrell Morelock enough at trial to try to back up his testimony, her testimony certainly served her own interests in minimizing her involvement in the conspiracy and murder.

Moreover, even if she were testifying truthfully, appellant asserts that such testimony did not corroborate Darrell Morelock's testimony that appellant was involved. By her own admission, she never met appellant. All she knew of appellant's involvement is what Darrell Morelock told her.

Appellant also expected that the Government would point to appellant's phone records, which show phone calls from buildings aboard Camp Lejeune and from pay phones in Jacksonville, as independent corroboration of Darrell Morelock's alleged conversation with appellant to plan the murder or to discuss the aftermath of it. Although appellant concedes these phone records are generally consistent with Darrell Morelock's testimony, he argues that the only evidence that appellant was the person at the other end of these conversations, or that the subject of these conversations was the murder of Connie Morelock, was the testimony of Darrell Morelock.[2] Appellant argues further that the same can be said of the motel and rental car receipts produced at trial. While they arguably are consistent with Darrell Morelock's testimony, they simply do not prove appellant was involved in a conspiracy to murder Connie Morelock.

Finally, appellant anticipated that the Government would also argue that the testimony of Corporal John Manley, USMC, is consistent with Darrell Morelock's testimony. Corporal Manley lived in the same barracks as

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[2] In a statement to the Naval Investigative Service, appellant said he had spoken with Darrell Morelock on the telephone several times during the summer of 1984. None of the calls were made by appellant, however, and the reason Darrell Morelock called was to speak with Lance Corporal Edward Williams, USMC, about money Williams owed him.

appellant. According to the trial testimony of Corporal Manley, on a Friday night in July 1984 he saw appellant dressing to go out. He asked if he could go with him and appellant allegedly said "No," that he was going to to play "Mike the Knife"[3] and make some money. He then saw appellant put a knife in his back pants pocket.

Appellant argues that Corporal Manley's testimony is simply too uncertain to be believed. He originally was not sure what month this conversation occurred. In his original sworn statement, he said the conversation occurred in the summer, "possibly in August."[4] In addition, even if it were a Friday night in July, *which* Friday night is totally unclear. It could not have been the Friday night before the murder, because Corporal Manley was in a motel that night, not in the barracks.[5] Moreover, even if Corporal Manley's testimony had some credibility, by itself it simply is not enough to corroborate Darrell Morelock's testimony.

Finally, appellant anticipated the Government would point out two allegedly incriminating statements appellant made during his trial to one of his chasers, Corporal David Whitlach, USMC. According to Corporal Whitlach, as he and appellant were leaving the courtroom after some of Darrell Morelock's testimony, appellant purportedly said

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[3] This was one of appellant's nicknames. "Buckethead" was another.

[4] Manley later altered the statement to read "possibly in July." The evidence as to when this alteration occurred was conflicting but we are satisfied that Manley's alteration was not due to improper influence and was due to his own independent recollection after having a period of time to reconstruct events from his memory.

[5] Manley later testified, in contradiction to the motel's records and his own previous testimony, that he *was* in the barracks that night.

"did you hear him in there lying? He said it was for ($)300 not $3,000."

Appellant also purportedly indicated that the only reason Morelock was testifying was to avoid the death penalty. Appellant's realization of that no more makes him a murderer than it does any other intelligent person who attended the trial and came to the same realization. As for the reference to the money, Corporal Whitlach himself testified that *he concluded appellant was* simply repeating the testimony of Darrell Morelock, not admitting guilt.

Finally, appellant asserts that his argument that Darrell Morelock was not credible is bolstered in the strongest possible way by the members' findings. The findings demonstrate unequivocally that the members did not believe Darrell Morelock either. Darrell Morelock consistently claimed that he was cowering in his car while appellant was murdering Connie Morelock. The members thought otherwise.

ANALYSIS

Undoubtedly appellant was convicted principally as a result of his accomplice's testimony. The issue in this case is whether or not that testimony needs to be corroborated by independent evidence. We hold that it does not.

The civilian federal courts, as well as a great number of state courts, clearly hold that uncorroborated accomplice testimony is "sufficient to sustain a conspiracy conviction unless it is incredible or insubstantial on its face." *United States v. Watson,* 677 F.2d 689, 691 (8th Cir. 1982); *see also United States v. Escalante,* 637 F.2d 1197, 1200 (9th Cir.), *cert. denied,* 449 U.S. 856, 101 S.Ct. 154, 66

L.Ed.2d 71 (1980); *United States v. Cravero,* 530 F.2d 66 (5th Cir. 1976).[6]

Just as clearly, the Manual for Courts-Martial (MCM), United States, 1969 (Rev.), mandates that a guilty finding cannot be had upon uncorroborated accomplice testimony which is "self-contradictor, uncertain or improbable" unless the testimony is corroborated. MCM, 1969 (Rev.), paragraph 74a(2), n.1. This Court has held in *United States v. Thompson,* 44 C.M.R. 732 (NCMR 1971) that one accomplice *e.g.,* Bates, cannot corroborate the testimony of another accomplice *e.g.,* Morelock, that the corroborating testimony must be independent of the accomplice; and, that the corroborating testimony must connect the accused with the offense. As to self-contradiction, the Court of Military Appeals has yet to determine whether or not acknowledged pretrial statements of an accomplice can establish the self-contradiction. *United States v. Aguinaga,* 25 M.J. 6, 7, n.1 (C.M.A. 1987). We also have not decided. The Courts of Military Review for the Air Force and Army, however, have decided that "the self-contradictory factor relates solely to the testimony of the witness during the trial." *United States v. McPherson,* 12 M.J. 789, 791 (ACMR), *pet. denied,* 13 M.J. 243 (C.M.A. 1982); *United States v. Rehberg,* 15 M.J. 691 (AFCMR), *pet. denied,* 16 M.J. 185 (C.M.A. 1983).

We need not decide which version of which rule applies, however, because even under the rule requiring corroboration where acknowledged pretrial statements contradict

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[6] Given our disposition of the issue below, we need not decide today whether or not the federal rule now applies to courts-martial, given the demotion of the "self-contradictory" rule in MCM, 1984, to the discussion of Rule for Courts-Martial 918(c); and, if so, whether or not the *ex post facto* clause, U.S. Const. Art. I, 9, cl. 3, would be violated by applying it to appellant.

trial testimony, there is no need for corroboration in the instant case. The testimony of Morelock is neither uncertain nor improbable. What contradictions do exist between his trial testimony and his pretrial statements are not material, but peripheral to the murder of Connie Morelock. *See United States v. McFarlin,* 19 M.J. 790 (ACMR), *pet. denied,* 20 M.J. 314 (C.M.A. 1985); *see also Aguinaga,* 25 M.J. at 6; *United States v. Diaz,* 22 U.S.C.M.A. 52, 46 C.M.R. 52 (1972). Additionally, the combination of the testimony of other non-accomplice witnesses, telephone records, motel logs and receipts, Marine Corps Base gate taxi log-book entries and rental car receipts corroborate Morelock's testimony.

This Court has an independent obligation to determine appellant's guilt beyond a reasonable doubt. Article 66(c), Uniform Code of Military Justice; *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). This includes the power to assess the credibility of the witnesses after making allowances for not having personally observed the witnesses. *Id.* Appellant contends Morelock's testimony is not worthy of belief. We disagree.

The members concluded that Darrell Morelock, not appellant, actually murdered Connie Morelock, and the appellant aided and abetted him. Even when all circumstances surrounding Morelock's testimony are considered, that testimony is highly credible and admits to no other reasonable conclusion but that appellant, at the very least, aided and abetted Morelock in the killing of Connie Morelock. The defense theory that Morelock framed appellant we find incredible considering the complexity of events as substantiated by neutral evidence offered by the Government. We are convinced beyond a reasonable doubt of appellant's guilt of the conspiracy to murder and the murder

of Connie Morelock. Article 66(c), UCMJ. Therefore the findings as approved on review below are affirmed. Under the circumstances of this case, we also find the sentence entirely appropriate and affirm the sentence approved on review below.

E. M. ALBERTSON

Chief Judge BYRNE and Judge JONES concur.

EDWARD M. BYRNE

R. A. JONES
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